

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARILYN WADSWORTH and U.S. POSTAL SERVICE,
POST OFFICE, Port Clinton, Ohio

*Docket No. 96-1537; Submitted on the Record;
Issued July 17, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability beginning July 19, 1996 causally related to her accepted June 24, 1993 injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion, under section 8128 of the Federal Employees' Compensation Act, by denying appellant's request for an oral hearing as untimely.

On June 24, 1993 appellant, then a 38-year-old rural carrier relief, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she injured a joint in her back and sustained muscle spasms due to tripping on a plastic band on the loading dock. The Office accepted the claim for low back sprain and herniated nucleus pulposus, and L5-S1 microdiskectomy surgery.

On June 28, 1995, the employing establishment offered appellant a limited-duty position of modified rural mail carrier for four hours per day, six days per week which appellant's physician, Dr. Robert W. Minick, approved on June 15, 1995. Appellant accepted the offer on July 7, 1995 and returned to limited-duty work on July 17, 1995.

By letter dated July 18, 1995, the Office requested an updated medical report from Dr. Brown.

By letter dated July 25, 1995, the Office referred appellant, together with a statement of accepted facts and medical records, to Dr. Sukhjit S. Purewal, a Board-certified orthopedic surgeon, for a second opinion evaluation.

By letter dated August 2, 1995, the Office acknowledged receipt of the request for physical therapy by Dr. Minick and requested an updated medical report discussing how appellant's current complaints were causally related to her accepted June 24, 1993 injury.

In a letter dated August 2, 1995, Dr. Minick noted that appellant experienced pain while at work on July 19, 1995. He placed appellant on medical leave until August 4, 1995.

In a release slip dated August 3, 1995, Dr. Jeffrey A. Brown, appellant's treating Board-certified neurological surgeon, checked that appellant was unable to perform her regular duties from August 3, 1995 through November 5, 1995. Dr. Brown also recommended that appellant undergo a functional capacity evaluation.

By letter dated August 9, 1995, the Office advised appellant of the deficiencies in the medical evidence submitted in support of her claim for a recurrence of disability. The Office informed appellant of the type of medical evidence required to support a claim for recurrence of disability.

On August 15, 1995 appellant filed a notice of recurrence of disability alleging that her disability commencing on July 19, 1995 was causally related to her accepted June 24, 1993 employment injury. Appellant stopped work on July 19, 1995.

In a report dated August 18, 1995, Dr. Purewal, based upon a statement of accepted facts, physical examination, employment history and medical records, opined that appellant was unable to perform her regular job as a rural mail carrier. Dr. Purewal, however, stated that appellant could perform restricted work which did not require "repetitive bending, stooping, lifting or twisting and that the lifting should be limited to no more than 10 pounds," and no prolong sitting or standing for more than an hour in one position. Dr. Purewal noted that appellant informed him that her limited-duty position required her to reach, twist as well as stand or sit in one position and that this aggravated her pain.

By decision dated September 11, 1995, the Office denied appellant's recurrence claim.

By letter dated December 10, 1995 appellant requested an oral hearing and reconsideration of the denial of her claim. In support of her claim she submitted reports dated August 2 and September 11, 1995 from Dr. Minick and Dr. Purewal's August 18, 1995 report, Dr. Brown's August 3, 1995 release slip and request for a functional evaluation.

Subsequent to her request, appellant submitted reports dated August 7 and December 19, 1995 from Dr. Jeffrey A. Brown, Professor and Chairman, Department of Neurological Surgery, Medical College of Ohio. In the August 7, 1995 report, Dr. Brown noted that appellant would be undergoing a functional capacity evaluation to determine her limitations and capabilities. Dr. Brown also noted that appellant "returned to work on July 17, 1995 which left her extremely uncomfortable." In the December 17, 1995 report, Dr. Brown noted the restrictions Dr. Purewal listed in his report. He reported that since October, 1995 appellant had been under the care of Dr. Robert Minick who had prescribed Ultram and Motrin four times daily along with physical therapy as appellant had increasing pain since October 1995 to her collateral side due to her previous surgery associated with numbness and weakness and some recurrence of her left leg pain.

By letter decision dated February 7, 1996, the Office denied appellant's request for a hearing as untimely.

The Board finds that the case is not in posture for a decision due to a conflict in the medical evidence between appellant's treating physicians, Drs. Minick and Brown and the second opinion physician, Dr. Purewal.

Section 8123(a) of the Act provides that "[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹ In this case, there is a conflict in medical opinion between the Office second opinion physician, Dr. Purewal, and appellant's attending physicians, Drs. Brown and Minick, with respect to whether appellant sustained a recurrence of disability causally related to her accepted June 24, 1993 employment injury. Dr. Minick, appellant's treating physician, opined that appellant's current complaints were causally related to her accepted June 24, 1993 employment injury. Dr. Brown, Professor and Chairman, Department of Neurological Surgery, Medical College of Ohio, opined that appellant was experiencing a recurrence of her left leg pain and that appellant was unable to perform her duties from August 3, 1995 through November 5, 1995. Dr. Purewal opined that appellant could perform restricted work. To resolve the conflict in medical opinion, the Office should refer appellant to an appropriate medical specialist, together with the medical evidence and a statement of accepted facts. Upon further development, the Office shall issue a *de novo* decision.

¹ 5 U.S.C. § 8123(a).

The decision of the Office of Workers' Compensation Programs dated September 11, 1995 is set aside and the case is remanded to the Office for action consistent with this decision.²

Dated, Washington, D.C.
July 17, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

² In view of the Board's disposition of the first issue, it is not necessary to adjudicate the second issue.